

Application No.: 10/647,699
Filed: August 25, 2003
Page 12 of 15

Examiner: William E. Tapolcai
Group Art Unit: 3744

Remarks/Arguments

Claims 1-28 were in the application as last examined. By this amendment, claims 1, 8, 9, and 24 have been amended. It is respectfully submitted that no new matter is added to the application by these amendments. Further consideration and examination are respectfully requested.

Interview

The courtesy of the Examiner during the interview of July 26, 2004 is acknowledged with thanks and appreciation. It is understood that, subject to the discovery of any additional art, the foregoing amendments will render the claims allowable.

Claim rejections under 35 U.S.C. §103

Claims 1-4, 6, 8-11, 14, 21, 22, 24, and 28 stand rejected under 35. U.S.C. §103 as being unpatentable over U.S. Patent No. 6,449,958 to Foye in view of U.S. Patent No. 4,596,370 to Adkins. The latter patent, although not expressly stated in the Office Action, was identified by the Examiner in a subsequent telephone conversation with the undersigned. The rejection is respectfully traversed.

In a § 103 rejection, the Examiner has the initial burden of establishing a prima facie case of obviousness based upon the prior art references. *In re Fritch*, 23 U.S.P.Q.2d 1780 (Fed. Cir. 1992). Further, a rejection of the invention is improper when the requisite teaching or suggestion to combine the teachings of the prior art references is absent. *In re Bell*, 991 F.2d 781, 26 U.S.P.Q.2d 1529 (Fed. Cir. 1993). In other words, "obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988); *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed Cir. 1992)." M.P.E.P. § 2143.01 The showing of combinability, in whatever form, must be "clear and particular." *In re Dembiczak*, 175 F.3d 994, 50 USPQ 2d 1614 (Fed. Cir. 1999)

Application No.: 10/647,699
Filed: August 25, 2003
Page 13 of 15

Examiner: William E. Tapolcai
Group Art Unit: 3744

Foye '958 discloses a beverage cooling apparatus that includes a housing 12 and a container 30 that is sized to releasably and fittedly receive a cylindrical can or cup-type container (col. 4, ll. 51-53). A thermoelectric device 67, a fan 68, and heat sinks 65, 66 are provided to cool a beverage can or cup disposed in the housing (col. 6, ll. 37-39) or in the container 30 (col. 5, line 27 et seq.). A securing means 40 releasably secures a cylindrical can in the container 30 (Foye col. 4, ll. 53-54).

Adkins '370 discloses an insulation sleeve 14 with a lid 30 containing a plurality of slits 33. The slits allow flexibility in the opening 32 so that containers 16 of various diameters can be held firmly in place.

Here, there is no basis for making the alleged combination, and therefore the Examiner has not raised a *prima facie* case of obviousness. The Examiner seems to suggest, without support, that if one ordinarily skilled in the art had started with the structure of Foye and wished to accommodate different sized containers, it would have been obvious to provide the container 30 of Foye with the lid 30 of Adkins for the purpose of providing increased versatility for the beverage container holder.

Nothing in either reference or in the alleged "purpose" asserted by the Examiner suggests the alleged combination. The container 30 of Foye discloses a securing means 40 in Fig. 4 that appears to be identical to the lid 30 of Adkins. Thus, there is nothing in Foye or in Adkins or in logic that would lead one to combine the teachings.

With respect to claim 1, Foye '958 does *not* disclose a beverage container support configured to support beverage containers having different vertical heights and different cross-sectional areas. Applicants intend the term "configured" in its ordinary sense of "designed, arranged, set up, or shaped with a view to a specific application or use." *The American Heritage Dictionary of the English language, Fourth Edition, Houghton Mifflin Company*. Applicants also intend the term "support" in its ordinary sense of "holding in position so as to keep from falling, sinking, or slipping." *ibid*. In other words, the container support of claim 1 has a design or an arrangement or set up or shape *specifically* to hold containers having different vertical heights and different cross-sectional areas in position so they do not fall, sink or slip. The container 30 of Foye '958 can certainly "hold" a beverage container that is smaller in cross-

Application No.: 10/647,699
Filed: August 25, 2003
Page 14 of 15

Examiner: William E. Tapolcai
Group Art Unit: 3744

section and taller in height as the Examiner asserts. But it is just as certainly *not* designed or arranged or set up or shaped *specifically* to support containers having different vertical heights and different cross-sectional areas *in position*. A smaller beverage container as contemplated by the Examiner can slip or fall within the container 30 because the container 30 is not configured to support a beverage container of any size other than what fits snugly within it or within the securing means 40.

Indeed, the container 30 is sized to fittedly receive a can or a cup (see col. 4, ll. 51-53), but there is no teaching or suggestion of any means to fittedly receive cans or cups having different cross-sectional areas and heights. A can or cup that is fittedly received will be "supported" in that it is held in position against falling, slipping, etc. But a can or cup of smaller dimension will not be supported because it is subject to slipping, falling, etc. and spilling its contents within the container 30. Adkins adds nothing more to the alleged combination.

In any event, even if the alleged combination were tenable, it does not reach the invention. Claim 1, as amended, requires the beverage container support to be in the chamber. Even if the securing means 40 of Foye or the lid 30 of Adkins were to be considered container supports, nothing in either reference teaches or suggests locating the container support within the chamber. Claim 1 is thus patentable, even over the alleged combination.

With respect to claims 2-4, nothing in Foye or Adkins teaches or suggests multiple recesses configured to receive different sized bottoms or a movable plate. Claim 6 depends from claim 1 and is patentable for the same reasons as claim 1. Claim 8 is likewise patentable for it also requires the container support to be within the chamber. Claims 9-11 are also patentable since they require multiple recesses or a plate, both concepts being absent from the cited references. Claim 14 depends from claim 8 and is patentable for the same reasons as claim 8.

Claim 21 requires a movable plate and was heretofore deemed allowed. It is believed that claim 21 was rejected in error. In any event, the movable plate is not found in either cited reference. Claim 24 requires the resizing element to be within the chamber. Neither reference teaches or suggests this concept. Claim 28 also describes the movable plate, a concept previously thought to be allowable in this combination.

Application No.: 10/647,699
Filed: August 25, 2003
Page 15 of 15

Examiner: William E. Tapolcai
Group Art Unit: 3744

Applicants acknowledge with thanks the Examiner's determination of the allowability of claims 5, 7, 12-13, and 25-27, and the allowance of claims 15-20, 22, and 23. Nevertheless, it is respectfully submitted that all of the claims in the application are allowable over the prior art of record. Notification of allowability is respectfully requested.

If there are any questions regarding this matter, please contact the attorney of record

Respectfully submitted,

CAROLYN SLONE ET AL.

Dated: 26 July 2004

By: 

Joel E. Bair, Reg. No. 33,356
Mark A. Davis, Reg. No. 37,118
McGARRY BAIR PC
171 Monroe Avenue, NW, Suite 600
Grand Rapids, Michigan 49503
616-742-3500

G0133961.DOC